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In The

Supreme Court of the United States

October Term, 1991

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

BRIEF OF THE STATE OF WYOMING IN REPLY TO NEBRASKA'S EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

JOSEPH B. MEYER
Attorney General of Wyoming
DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General
MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

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JURISDICTION

Nebraska characterizes her Petition for Enforcement of Decree and for Injunctive Relief (Docket No. 1) ("petition") as seeking modification of the Decree[1] pursuant to Paragraph XIII(f) of the Decree. Nebraska Brief at 2-3.[2]

1. Unless otherwise indicated, "the Decree" refers to the Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), and "original proceeding" refers to the litigation resulting in that Decree.
2. Nebraska's Brief in Support of Exceptions, July 1, 1992, will be cited in this brief as "Nebraska Brief." The Brief of the State of Wyoming in Support of Exceptions to the First and Second Reports of the Special Master will be cited in this brief as "Wyoming Brief on Exceptions."

That characterization conflicts with both the tenor of the petition and the assurance Nebraska gave the Court when seeking leave to file the petition that "Nebraska does not seek to modify the Decree in any respect, . . ." Nebraska Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 2 (Docket No. 4). Moreover, as recently as the March 9, 1992 hearing on the Special Master's Draft Second Interim Report, when pressed by the Special Master, counsel for Nebraska admitted that the petition did not contain a claim under Paragraph XIII(f) to modify or reconsider the exemption of municipal uses in the Decree. Transcript of Hearing, March 9, 1992 at 27-28 (Docket No. 435).

The Court has not exercised jurisdiction over a claim to modify or enlarge Nebraska's decreed apportionment. In fact, the Court denied Nebraska leave to file an amended petition to modify the Decree. *Nebraska v. Wyoming*, 485 U.S. 931 (1988). Nebraska's second motion for leave to amend is pending before the Court. *Id.*, 112 S.Ct. 1930 (1992). In contrast to the present petition to enforce, Nebraska's second amended petition, like the first, would expressly request modification of the Decree.

The Court granted Nebraska leave to file the present petition to enforce the Decree over Wyoming's objection that Nebraska had failed to show injury. *Nebraska v. Wyoming*, 479 U.S. 1051 (1987). The Court apparently recognized that Nebraska could be granted leave to file her claims that Wyoming is violating the injunctions in the Decree without requiring a concurrent showing of resulting injury or damage. *See Wyoming v. Colorado*, 309 U.S. 572, 581 (1940). However, to the extent Nebraska seeks to modify the Decree to add new injunctions against Wyoming's otherwise lawful use of the

North Platte and its tributaries under Wyoming's Constitution and laws, Nebraska must meet a greater burden to invoke the Court's original jurisdiction. *See Alabama v. Arizona*, 291 U.S. 286, 291-92 (1934) ("a state asking leave to sue another to prevent the enforcement of laws must allege in the complaint offered for filing facts that are clearly sufficient to call for a decree in its favor"). Further, to prevail in such a case, Nebraska "must prove by clear and convincing evidence some real and substantial injury or damage." *Idaho v. Oregon*, 462 U.S. 1017, 1027 (1983).

Since the Court assumed jurisdiction over Nebraska's petition and since Wyoming filed its first summary judgment motion, Nebraska's focus has shifted away from a strict enforcement action. Instead, Nebraska tries to recharacterize her initial petition as one to modify rather than to construe and enforce the Decree. One of Wyoming's objections to such a recharacterization is the same as Wyoming's primary objection to Nebraska's two motions to amend her petition — Nebraska is unable to articulate any threat of real and substantial injury to support modification of the Decree.

INTRODUCTION AND STATEMENT OF THE CASE

Nebraska takes exception to two legal conclusions of the Special Master: (1) that the Decree did not expressly apportion water in the Laramie River to Nebraska and (2) that municipal use of Deer Creek Reservoir is not restricted or affected by the Decree. Wyoming opposes both exceptions. The issues are simple questions of decree construction. However, Nebraska confounds those legal issues with immaterial factual disputes, out-of-context

references to the record of the original proceeding and outright misstatements of fact. Nebraska's brief contains just a sampling of Nebraska's abstruse factual arguments that the Special Master allowed to stand in the way of a definite conclusion on most of the legal questions of decree interpretation presented in the cross-motions for summary judgment.

Nebraska's brief contains several misstatements of fact that must be corrected at the outset. Throughout her brief, Nebraska tries to give the impression that every drop of water in the North Platte River has been committed to pre-1945 uses. The common thread in Nebraska's claims in this case has been the assertion that any new use in Wyoming since 1945 violates Nebraska's apportionment. Thus, the relief that Nebraska apparently seeks is the prohibition of any uses in Wyoming that did not exist when the Decree was entered in 1945.

When the Court said that the North Platte River was "over-appropriated" it meant that the demand exceeded the available natural flow during certain times of a year or during certain years — not all of the time. *Nebraska v. Wyoming*, 325 U.S. 589, 608 (1945). Despite the shortage experienced in the 1930's, Special Master Doherty and the Court found that natural flow and supplemental storage supplies approaching the long-term average would be more than sufficient to meet the demands in all three states. *Nebraska v. Wyoming*, 325 U.S. at 604-05. Moreover, Special Master Doherty recognized that a return to more normal conditions of supply than experienced during the 1930's drought might warrant relaxation of the Decree's restrictions on Wyoming and Colorado, and, for that reason, he recommended that the Court retain jurisdiction. Doherty Report at 10-11. In fact,

conditions of supply have improved since entry of the Decree in 1945. Affidavit of John W. Shields at 3, ¶7, Table 2 and Figure 3, Wyoming Second Motion for Summary Judgment (Docket No. 294). Since 1945, Nebraska's canals both above and below Tri-State Dam have taken much more water than needed to meet the requirements determined in the original proceeding. *See* Wyoming Brief on Exceptions at 8 n.6.

An example of how Nebraska has distorted the facts in an attempt to make it appear that Deer Creek Reservoir would reduce Nebraska's apportionment is found in her statement that Deer Creek Reservoir is "designed to capture the entire tributary inflow from Deer Creek above the reservoir in most years." Nebraska Brief at 33. To the contrary, the record establishes that Deer Creek Reservoir will be subject to the Wyoming law of prior appropriation and will store only water that is excess to the prior water rights on Deer Creek as well as the prior storage rights of Glendo and Guernsey Reservoirs on the North Platte River. Final Environmental Impact Statement for Regulatory Permits, Deer Creek Dam and Reservoir at 2-28 to 2-29, 4-9 (Docket No. 84a); Wyoming's Answers to United States' First Set of Interrogatories at 2-3, 6-8, Nos. 2, 10-13 (Docket No. 79); Wyoming's Response to United States Third Set of Interrogatories at 11, No. 25 (Docket No. 215); Deposition of David G. Wilde at 397-98 (Docket No. 158). The very fact that a 66,000 acre-foot reservoir is needed to provide the 6,400 to 9,600 acre-feet of annual yield[3] reflects the reality that Deer Creek will not "capture the entire tribu-

3. "Annual yield" refers to the amount of water that, based upon hydrologic analysis, can be withdrawn for use annually from the reservoir without substantial risk to the ability to make such withdrawals in the future.

tary inflow from Deer Creek" but will only store flows excess to the needs of other water rights in the plentiful years in order to conserve that supply for use in the dry years.

Nebraska also alleges that "[t]he proposed Deer Creek Project is a large scale multi-purpose project . . . ." Nebraska Brief at 14. In reality, Deer Creek's 6,400 to 9,600 acre-feet of average annual yield is quite small in comparison to the 1941-1990 average annual diversions of over one million acre-feet in the Guernsey to Tri-State section of the river. Affidavit of Bern S. Hinckley (sum of average Nebraska diversions of approximately 895,000 acre-feet from Figure 1A and average Wyoming diversions of approximately 230,000 acre-feet from Figure 2A), Wyoming Second Motion for Summary Judgment (Docket No. 294). The primary purpose of Deer Creek Reservoir is to provide a municipal supply. Any non-municipal uses either would be incidental to the municipal use and would not result in additional depletion (e.g., recreational use of the reservoir) or would be temporary, interim uses of the stored water pending full development of the municipal demand. Affidavit of Michael K. Purcell, ¶4, Wyoming [First] Motion for Summary Judgment at 27 (Docket No. 23); Second Affidavit of Michael K. Purcell, ¶11, Wyoming Second Motion for Summary Judgment (Docket No. 294).[4]

4. The ability to make such temporary or incidental uses of the reservoir is not vital to the Deer Creek Project. The administrator of the Wyoming Water Development Commission stated that Deer Creek Reservoir would be viable even if the temporary or incidental non-municipal uses were disallowed. Second Affidavit of Michael K. Purcell, ¶10, Wyoming Second Motion for Summary Judgment (Docket No. 294). Nebraska apparently asserts that Wyoming cannot "take it upon herself to limit Deer Creek to purely municipal uses." Nebraska Brief at 34. But the Wyoming Water Development Commission, an agency of the State of Wyoming, is the sole sponsor of the project and certainly can limit uses of the project water. Whether limiting the use of the project would constitute a significant change that would require modification of a federal or state permit is not an issue in this case but a matter for the agency responsible for that permit.

In another mischaracterization of the facts, Nebraska says, "The Laramie River flows have been included as the most significant part of the 'total Wyoming tributary inflows' and have been subject to the 75%/25% apportionment in ¶V of the Decree since 1945." Nebraska Brief at 11. In support of that broad statement, Nebraska then compares the Laramie inflows only to the Whalen to Tri-State accretions and says that such inflows amounted to 26% of the "apportioned accretions in the Whalen to Tri-State Dam section as shown in Table III of the Doherty Report." *Id.* at 10 n.12, 31 (characterizing the Laramie River as "26% of the supply").[5] Nebraska's characterization ignores the fact that the accretions in that lower section are only a small part of the total supply, most of which originates above Guernsey Dam. *See* Doherty Report at 67, Table III. The Laramie River inflows from Table III of the Doherty Report constituted about 2% of the total supply depicted in Table III and less than 5% of the average natural flow available from all sources for diversion in the Guernsey Dam to Tri-State Dam section shown in Doherty's Table IV. Doherty Report at 67, 71.[6]

5. As used here, the term "accretions" means tributary inflow and return flow reaching the river in the section and does not include the lion's share of the flow that enters the section at Guernsey Dam. It is noted also that "Guernsey Dam" and "Whalen Diversion Dam" or "Whalen" are sometimes used interchangeably to denote the upstream end of the section that is apportioned in Paragraph V of the Decree.

6. There are many other misstatements of fact in Nebraska's brief. For example, Nebraska asserts that Glendo Reservoir stores water for the North Platte Project. Nebraska Brief at 5. Glendo Reservoir was authorized and constructed as a separate unit of

SUMMARY OF ARGUMENT

Nebraska's entire argument is pure sophistry aimed at obscuring the clear language of the Decree in order to effect a new apportionment of the North Platte River. At times, it depends on misstatement or mischaracterization. At other times, it depends on attenuated inferences drawn from out-of-context portions of the record in the original proceedings as an alternative to the plain language of the Court's decrees and opinions in this case and in *Wyoming v. Colorado*, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *decree vacated and new decree entered*, 353 U.S. 953 (1957). The Court should preserve the certainty provided by the clear language of its Decree and decline Nebraska's invitation to reapportion the North Platte by unduly complicating the interpretation of the Decree.

Paragraph V of the Decree simply divides the daily quantity of natural flow water *present in* the Guernsey to Tri-State section of the North Platte River. Contrary to Nebraska's argument, Paragraph V does not provide a mechanism to assure flows from any source into that section, nor does it apportion or otherwise affect the flows of any source before they reach that section.

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the Missouri River Basin Project. Act of July 16, 1954, ch. 532, 68 Stat. 486. It has no separate right to capture and store flows for the North Platte Project. Glendo's only right to store water is for 40,000 acre-feet annually as described in Paragraph XVII of the Decree. Such storage is used by individual contractors who do not receive water from the North Platte Project. This distinction is important because the Special Master appeared to be under the same mistaken impression that Glendo Reservoir is part of the North Platte Project when he ruled that the United States has a right to store water for the Inland Lakes in Glendo Reservoir. *See* Wyoming Brief on Exceptions at 62-63.

Nebraska's request for an apportionment of water in the Laramie River was denied in the original proceeding. Yet Nebraska persists in arguing that Paragraph V contains an express apportionment of the Laramie River to Nebraska without quoting the express passage to sustain the argument. Moreover, Nebraska's argument fails to explain away the Court's clear assurance to Wyoming and Colorado that the North Platte Decree would not affect the apportionment of the Laramie River between them. Decree, ¶XII(d); *see also Nebraska v. Wyoming*, 325 U.S. at 592 n.1. Instead, Nebraska constructs an argument on an intricate calculation of the percentage of the contribution of Spring Creek that is not only irrelevant but misleading. By no stretch of logic can the Court's reference to Spring Creek flows extend the operation of the 75%/25% apportionment in Paragraph V to include the Laramie River. In context, the Court referred to Spring Creek flows for the simple purpose of assuring that such flows reaching the North Platte River below the state line would be accounted for in the apportionment.

Nebraska then makes an inane argument about the syntax of Paragraph X to suggest that Paragraph X supersedes Wyoming law. Contrary to Nebraska's assertion, the Special Master's recognition of the municipal use exemption does not upset the intrastate prior appropriation system. The Paragraph X exemption simply leaves municipal use in Wyoming to be governed by the intrastate law of prior appropriation. Nor is there any conflict between Paragraph X and Paragraph XII(a) of the Decree. Paragraph XII(a) simply confirms that relative rights intrastate are to be governed by state law. Because the proposed use of Deer Creek Reservoir for municipal purposes complies with state law, Paragraphs X and XII(a) together place such use outside the Decree.

Even if the Court were to consider the imposition of new restrictions under Paragraph XIII(c) in this case, Paragraph X puts municipal uses outside any restrictions that could be imposed under Paragraph XIII. Such a common sense construction of the Decree does not contravene Paragraph XIII. No one disputes that an action could be brought under Paragraph XIII(f) to amend the Decree if changed conditions cause the operation of the municipal exemption in Paragraph X to no longer be equitable. However, the petition the Court accepted for filing and referred to the Special Master contains no such claim.

ARGUMENT

I. NEBRASKA UNDULY COMPLICATES THIS CASE WITH ARGUMENTS CONSTRUCTED ON ISOLATED PORTIONS OF A LENGTHY TRIAL RECORD

Nebraska's brief gives the impression that this case is one of the most complicated ever to reach the Court's original docket. In reality, the pleadings raise simple issues about alleged violations of the Decree. Those issues are capable of straightforward resolution based on construction of the existing Decree.

The Decree has governed the interstate apportionment of the North Platte River for almost 50 years not with unstated injunctions implied from an underlying trial record or decisions in other cases but with clear injunctions specifying what the parties are enjoined to do or refrain from doing. Such clarity is the minimum required of any injunction in equity jurisprudence. *Gunn v. University Committee to End the War in Vietnam*, 399

U.S. 383 (1970); *Schmidt v. Lessard*, 414 U.S. 473 (1974). Such definiteness is also vital to the certainty that is the very purpose of decrees settling disputes over rights to water in the arid West. *See Arizona v. California*, 460 U.S. 605 (1983); *Nevada v. United States*, 463 U.S. 110 (1983).

If a court is called upon to interpret an ambiguous decree, it properly may look to the underlying record to define the issues that were intended to be resolved by the decree. *See Wyoming v. Colorado*, 286 U.S. 494, 506-08 (1932). But if a decree is not ambiguous, evidence taken out of context from the record cannot substitute for the plain language of the decree. While Nebraska pays lip service to the plain language of the Decree, she urges the Court to impose restrictions on Wyoming based upon inferences she would have the Court draw from isolated portions of a lengthy trial record quoted out of context or from inaccurate characterizations of the Court's decisions and decrees apportioning the Laramie River. To follow where Nebraska's arguments would lead, the Court must founder in a morass of uncertain injunctions urged as alternatives to the plain language of the Decree.

The Court should interpret and enforce its previous opinions and decrees by their terms. However, if the Court deems it necessary or desirable to delve into the underlying record with respect to the issues raised in Nebraska's exceptions, Wyoming's briefs in the record before the Special Master fully address those matters.

While Special Master Doherty's Report in the original proceeding may help to define the controversy determined by the 1945 Decree, that report must be understood in the context in which it was developed. The

litigation spanned 11 years and resulted in nearly 30,000 pages of transcribed testimony, many hundreds of exhibits, and thousands of pages of briefs. Each party had proposed a different method of apportionment and had structured its evidence to support that party's particular proposal. Special Master Doherty ultimately rejected all the proposals and recommended a system of apportionment not proposed by any of the parties. However, recognizing that his role was only to recommend, Special Master Doherty provided a full panoply of factual findings in his report to allow the Court to determine, first, whether any apportionment at all was called for and, second, what method of apportionment ought to be used.

An example of how Nebraska distorts the record by relying on isolated portions out of context is her reliance on Special Master Doherty's inclusion of Laramie River flows in his analysis of historical supplies. In context, the fact that the Doherty Report contained an analysis of historical supply including the Laramie River contributions does not, as Nebraska argues, signify that the Court intended to restrict Wyoming's use of the Laramie River. Rather, it shows only that Special Master Doherty had thoroughly reviewed the evidence presented and was fully aware of the facts when he rejected Nebraska's claim for an apportionment of water in the Laramie River and recommended the exclusion of the Laramie River from the apportionment. Doherty Report at 124, 177.

Special Master Olpin found himself unable to resolve the important questions of decree interpretation because he allowed Nebraska's references to isolated portions of the Doherty Report and the underlying record to remove his focus from the plain meaning of the opinions and

decrees. The Court should not make the same mistake. This is a suit to enforce the existing Decree, and Wyoming is entitled to judgment on Nebraska's claims that Wyoming is violating or threatening to violate the Decree.

II. THE COURT SHOULD RULE AS A MATTER OF LAW THAT THE LARAMIE RIVER WAS EXCLUDED FROM NEBRASKA'S APPORTIONMENT UNDER THE DECREE

A. Whether the Decree Excludes Water in the Laramie River is a Question of Law That Should Be Decided on Summary Judgment

Wyoming and Nebraska agree that there are no genuine issues of material fact in dispute with respect to the Laramie River and that the Court should determine as a matter of law whether the Decree apportions water in the Laramie River to Nebraska. The Special Master agrees that the facts are not in dispute and that Nebraska did not receive an express apportionment of the Laramie. Second Interim Report at 40, 59. However, he would have the Court authorize further proceedings, unspecified in nature, to determine whether there are equities that would move the Court to impose restrictions on Wyoming's use of the Laramie River in the first instance. The Special Master failed to recommend a resolution of the legal issue presented: Does the apportionment of the Guernsey to Tri-State flows in the Decree affect Wyoming's use of water in the Laramie River? After rejecting Nebraska's argument that the Decree expressly apportioned water in the Laramie, the Special Master

should have recommended summary denial of Nebraska's claims that Grayrocks Reservoir and the Corn Creek Project violate the Decree.

B. Paragraph V of the Decree Contains No Express or Implied Apportionment of Water in the Laramie River

Nebraska is less than clear about what she views as her apportionment of water in the Laramie River. At the outset, she asserts that her summary judgment motion sought only a declaration of the obvious and acknowledged point that "the inflows of the Laramie River to the North Platte River were apportioned 75% to Nebraska and 25% to Wyoming in Paragraph V of the Decree." Nebraska Brief at 18. There is no dispute that any flows from the Laramie River that reach the North Platte River during the irrigation season, like all other accretions in the section, lose their character as tributary flows and become "natural flow in the Guernsey Dam to Tri-State Dam section" of the river. Once in that section of the North Platte River, all of the natural flow water is subject to the percentage apportionment in Paragraph V of the Decree.

However, Nebraska argues that "express" in Paragraph V of the Decree is the apportionment to Nebraska of the historical level of Laramie River contributions included by Special Master Doherty in Table III of his report. Nebraska Brief at 19-27; Doherty Report at 67.[7]

7. One cannot discern from Nebraska's argument whether she asserts (1) that only the volume of Laramie River flows contained in Doherty's Table III was apportioned to Nebraska and any Laramie River flow beyond that amount may be used by Wyoming, (2) that Paragraph V, in apportioning the historical contribution of the Laramie River to Nebraska, prohibited any use of Laramie River water by Wyoming other than uses that existed in 1945, or (3) that Wyoming's uses of water in the Laramie River initiated since 1945 are to be counted as part of Wyoming's 25% of natural flow in the Guernsey Dam to Tri-State Dam section under Paragraph V. Whatever relief Nebraska is seeking, her premise that Paragraph V apportions water in the Laramie River is wrong.

Nebraska goes far out on a limb with that extreme argument. The contradiction in Nebraska's argument is patent in her conclusion:

> The record unequivocally demonstrates that 75% of the flows of the Laramie was expressly apportioned to Nebraska.

Nebraska Brief at 32. Nebraska repeatedly states that an apportionment of water in the Laramie River is "express" in Paragraph V. Yet she must resort to the record to try to demonstrate its existence. Something is not *express* in a decree if its meaning can be discerned only by inference from selected argument or evidence in the underlying record. Nebraska has failed to overcome the silence of Paragraph V with regard to the Laramie River and the plain language of the Court's opinion and Decree excluding the Laramie River from the apportionment. *Nebraska v. Wyoming*, 325 U.S. at 592 n.1, 671 (Decree, ¶XII(d)); *see also* Doherty Report at 124, 177.[8]

8. As Wyoming demonstrated in briefs before the Special Master, the record in the original proceeding supports neither Nebraska's view that the Laramie River was apportioned to Nebraska nor the Special Master's view that the Decree rests somehow on an assumption that a certain amount of Laramie River flows would continue. Rather the record shows that initially Nebraska (1) sought to include water rights on the Laramie River in the interstate priority system she proposed, (2) attacked a number of senior Laramie River water rights which had not yet been fully developed because she feared that the full development of those

Paragraph V of the Decree quite simply calls for a 75%/25% division of whatever natural flow is present in the Guernsey Dam to Tri-State Dam section of the North Platte River during the irrigation season. Other portions of the Decree include specific injunctions limiting uses in Wyoming and Colorado and storage in the federal reservoirs above Guernsey Dam. Decree, ¶¶I-IV. The Court determined those injunctions to be adequate protection for the supply of natural flow to the apportioned section.[9] However, none of those injunctions extends to the Laramie River. The Decree imposes no monitoring

rights in the future would "curtail" Laramie River flows into the North Platte, (3) insisted that she was not bound by the Laramie River decree in *Wyoming v. Colorado*, and (4) sought an express apportionment of water in the Laramie River. As the case proceeded, Nebraska's focus shifted from the Laramie and she did not include Laramie River water rights in her priority administration studies. Her own witness as well as those of the United States testified that the contribution of the Laramie River was "negligible" during the ciritical period of the irrigation season. Consequently, when Nebraska developed her "out of priority study", which was the core of her claim of injury as well as her proposal for an apportionment, she did not include water rights on the Laramie River. Finally, even though Nebraska and the United States filed detailed exceptions to Special Master Doherty's report, neither took exception to Special Master Doherty's exclusion of the Laramie River from his recommended apportionment. It is impossible to find in the Decree express or implied restrictions on Wyoming's use of the Laramie when, in the final analysis, none of the parties even requested such relief. *See* Wyoming Brief in Support of Second Motion for Summary Judgment at 10-16, 23-26, 30-40, 42-47 (Docket No. 294); Wyoming Brief in Response to Summary Judgment Motions of Nebraska and the United States at 6-13, 18-21 (Docket No. 334); Wyoming Reply Brief in Support of Second Motion for Summary Judgment at 12-26 (Docket No. 352).

9. When fashioning the Decree, the Court recognized that a large part of the water supply for canals in the Guernsey to Tri-State section would come from storage water captured in the reservoirs listed in Paragraph III in the non-irrigation season. *Nebraska v. Wyoming*, 325 U.S. at 605-06, 645.

or reporting requirements on Wyoming with respect to uses on the Laramie River.

Moreover, the practical administration of the Decree since 1945 shows that the parties never thought the Decree restricted Wyoming's use of the Laramie in any way. Neither Nebraska nor the United States ever requested Wyoming to account for diversions from or uses of the Laramie River. Affidavits of Floyd A. Bishop and George L. Christopulos and Second Affidavit of Gordon W. Fassett, Wyoming Second Motion for Summary Judgment (Docket No. 294); Deposition of David G. Wilde at 365-66 (Docket No. 158); Deposition of Earl Michael at 215-18 (Docket No. 204a). The accounting procedure used to determine the natural flow in the Guernsey Dam to Tri-State Dam section has always simply included whatever Laramie River flows happened to reach the North Platte River regardless of the amount or source of such flows or the magnitude of uses of the Laramie in Wyoming. Deposition of William G. McCracken at 30-34 (Docket No. 158); Deposition of H. Lee Becker at 47-54 and Exhibit 4 (Docket No. 287); Affidavit of Floyd A. Bishop, Wyoming Second Motion for Summary Judgment (Docket No. 294).

Nebraska's current theory to support a claim to the Laramie River under Paragraph V is that the Court established a "Whalen/Tri-State apportionment fund" from Table III of the Doherty Report. Nebraska Brief at 19-27; Doherty Report at 67. In essence, Nebraska argues that she was given a mass allocation of 75% of the "apportionment fund" she says was fixed in Table III of Doherty's Report. While Table III of Doherty's Report was compiled in part from data provided by Wyoming in support of her mass allocation proposal, it is beyond ques-

tion that the Court rejected the proposal for a mass allocation.

Nebraska is reaching when she asserts that Table III of the Doherty Report "sets forth the apportionment fund in the Whalen/Tri-State reach" which is apportioned by Paragraph V. Nebraska Brief at 27. The table simply summarized a comparison of total supply, including storage water, with the determined requirements in the Guernsey Dam to Tri-State Dam section. But neither Doherty nor the Court used Table III in determining the percentage apportionment. A comparison of determined water requirements, irrigated acreages and priorities was the basis of that percentage apportionment. Doherty Report at 151-52. The percentage apportionment applies not to the quantities set out in Doherty's Table III, but to the natural flow that reaches the Guernsey to Tri-State section after operation of the various upstream injunctions in the Decree.

The Court's opinion refers to the data from Table III once. That reference was only in the context of reviewing Doherty's overall analysis of historical water supply in comparison to requirements. *Nebraska v. Wyoming*, 325 U.S. at 604 n.9. The Court cannot reasonably infer from that single footnote reference in the opinion that the Decree thereby fixed a specific amount of Laramie River contributions as part of Nebraska's apportionment or restricted Wyoming's future use of water in the Laramie River.[10]

10. It is not clear whether Nebraska is returning to an argument she made before the Special Master, and later abandoned, that the Laramie River decree in *Wyoming v. Colorado*, 259 U.S. 419 (1922), had effectively limited Wyoming's use of the Laramie River. Nebraska argued that the Laramie River decree allocated a finite amount of Laramie River water to Wyoming for water rights upstream of Wheatland with priorities senior to the Colorado diversion that had precipitated the dispute in that case. Nebraska Brief at 21-22; Nebraska's Post-Hearing Brief on Nebraska's, Wyoming's, Colorado's, and the United States' Motions for Summary Judgment at 14 n.7 (Docket No. 375). The argument fails because it ignores the existence of the large number of water rights on the Laramie River downstream of Wheatland and junior to the disputed Colorado diversion. *Wyoming v. Colorado*, 259 U.S. at 488, 495-96; Affidavit of Francis A. Carr, Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States (Docket No. 334). It also conflicts with the very basis of the *Wyoming v. Colorado* decision which avoided limiting Wyoming's diversions and recognized that Wyoming would have to construct and use new storage facilities to realize the "dependable supply" that the Court had found necessary for the uses above Wheatland. *Wyoming v. Colorado*, 259 U.S. at 471-72, 484-86. For an in-depth analysis of Nebraska's argument, *see* Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States at 6-12 (Docket No. 334).

C. The Reference to Spring Creek in Paragraph V of the Decree Has No Bearing on the Exclusion of the Laramie River From the Apportionment

Urging upon the Court a profound *non sequitur*, Nebraska argues that Paragraph V's express reference to Spring Creek, combined with its silence as to the Laramie River, translates into an "express" apportionment of water in the Laramie River to Nebraska. Nebraska reaches that conclusion circuitously by mischaracterizing the context in which Spring Creek came to be specifically mentioned in Paragraph V.

The simple answer is that, under the plain language of Paragraph V, accretions from Spring Creek, like those from the Laramie River or any other tributary source in the Guernsey to Tri-State section, become natural flow in the Guernsey to Tri-State section only after they have reached the North Platte River. Thus, Nebraska's Spring

Creek argument proves nothing. However, Wyoming addresses Nebraska's references to the briefs in the original proceeding in order to demonstrate the danger in relying on Nebraska's characterization of isolated portions of the record to add content to the Decree.

Wyoming raised the issue of Spring Creek twice in her brief on exceptions to Special Master Doherty's Report. The first reference was in the context of urging her proposed apportionment by mass allocation. Wyoming simply pointed out that the contribution of Spring Creek, being available in the river above the Tri-State Canal and the Ramshorn Canal but below the state line, should be accounted for in the volumes proposed to be allocated to each state. Brief of Defendant, State of Wyoming at 62-63 (January 29, 1945), Appendix to Nebraska Brief at A-41 to A-42. This is the reference that Nebraska quotes in her present brief. Nebraska Brief at 30. However, the Court did not address that reference in the opinion. The Court had rejected Wyoming's proposed mass allocation theory and, therefore, there was no reason to separately address Wyoming's argument that Spring Creek should be included in the mass allocation.

Wyoming's other reference to Spring Creek was in the context of excepting to Special Master Doherty's inclusion of the Ramshorn Canal requirements among the uses entitled to protection by the recommended apportionment. Brief of Defendant, State of Wyoming at 75-76 (January 29, 1945) (excerpt reproduced in Appendix to this brief at A-1). There, Wyoming simply pointed out that, when comparing historical supply with water requirements in Table III, Special Master Doherty had included a requirement of approximately 3,000 acre-feet for the Ramshorn Canal, which historically diverted

downstream of Tri-State Dam, but had not included the 2,855 acre-feet of supply from Spring Creek. As Wyoming had explained earlier in her brief, the omission of Spring Creek in Table III had resulted from Special Master Doherty's use of figures from Wyoming's Exhibit 148 in a column entitled "Whalen State Line Usable Net Accretions", which did not include the Spring Creek accretions below the state line.[11] See footnote to Wyoming Exhibit 150, Appendix to Nebraska Brief at A-34. Wyoming simply pointed out that, if the Ramshorn requirement was to be considered, the supply available from Spring Creek should also be considered. For simplicity, Wyoming suggested eliminating the Ramshorn Canal requirement in order to compensate for the exclusion of the Spring Creek accretions.

Nebraska fails to acknowledge the later reference by Wyoming to the Spring Creek flows, although that reference was clearly what the Court was responding to when it said the Spring Creek "accretion should be taken into account in computing Nebraska's requirement of water from Wyoming . . . ." *Nebraska v. Wyoming,* 325 U.S. at 663; Nebraska Brief at 30. Contrary to Nebraska's assertion, the Court did not "adjust" the figures in Doherty's Table III, but simply agreed with Wyoming's point that

11. Contrary to Nebraska's assertion, there was no error in the Wyoming exhibits used by Special Master Doherty in Table III. Nebraska Brief at 10, 28. The Wyoming exhibits had divided the sections at the state line, rather than at Tri-State Dam. Therefore, the Spring Creek accretions below the state line were included in the state line to Bridgeport section of the Wyoming exhibits. Special Master Doherty used the flows from the Whalen to state line section of the Wyoming exhibits, but purported to analyze the reach from Whalen to Tri-State Dam. Wyoming merely pointed out that, because Special Master Doherty had extended the reach from the state line to Tri-State Dam, the Spring Creek accretions should be taken into account.

if the Ramshorn Canal requirement was to be included in the apportionment, the Spring Creek supply also should be considered. Instead of removing the Ramshorn requirement from the analysis as Wyoming proposed, the Court assured that any flow reaching the river from Spring Creek would be accounted for as part of the natural flow to be apportioned.

Thus, it was the fact that Spring Creek came into the North Platte below the state line that caused the Court to mention Spring Creek expressly. The Court's reference to Spring Creek in the opinion and in the Decree was merely to confirm that any obligation that Wyoming would have to pass water at the state line under the apportionment would be partially offset by the Spring Creek accretions below the state line.[12] However, the requirement in Paragraph V of the Decree that the accounting for the 75%/25% division of natural flow should include any contribution of Spring Creek does not change the fact that the percentage apportionment applies to water *present in* the Whalen to Tri-State section. The Decree imposes no restriction on Wyoming's use of water in the Laramie River. Moreover, Paragraph V does not assure a fixed quantity of inflows from any source in the section.

12. The accounting procedure agreed upon by the parties since at least 1960 calculates the natural flow in the Guernsey to Tri-State section by adding all of the diversions from the section to the flow passing Tri-State Dam and subtracting the amount of storage water entering the section. Affidavit of Floyd A. Bishop, ¶¶6-9, Wyoming Second Motion for Summary Judgment (Docket No. 294). Thus, the express reference to Spring Creek accretions in Paragraph V turned out to be unnecessary because all accretions in the section are automatically included in the accounting subsequently developed by the parties to implement the Decree.

As shown in Wyoming's Brief on Exceptions, the Court could not adopt Nebraska's argument that a specific quantity of water in the Laramie River was included in Nebraska's apportionment without creating irreconcilable conflicts with its existing decrees and opinions in both *Nebraska v. Wyoming* and *Wyoming v. Colorado*, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *decree vacated and new decree entered*, 353 U.S. 953 (1957). Nebraska's careless assertion that "[t]he Laramie Decree makes no mention whatsoever of Wyoming's asserted entitlement to 'all the remaining' waters of the Laramie" is wrong. Nebraska Brief at 22. The 1957 decree in *Wyoming v. Colorado* could not be clearer:

> The State of Wyoming, or anyone recognized by her as duly entitled thereto, shall have the right to divert and use all water flowing and remaining in the Laramie River and its tributaries after such diversion and use in Colorado.

353 U.S. at 953.

Nebraska was not a party to *Wyoming v. Colorado* apportioning the Laramie River. Special Master Doherty recognized that Nebraska was not bound by the Laramie River decree in the strict sense of *res judicata*. He therefore allowed Nebraska to litigate her claim for an apportionment of the Laramie River in *Nebraska v. Wyoming* over Wyoming's and Colorado's objections that the Laramie had been fully apportioned between them. However, after considering all of the evidence, Special Master Doherty recommended, and the Court agreed, that Nebraska's equities did not warrant restrictions on Wyoming's use of the Laramie. Doherty Report at 124. The Court's exclusion of water in the Laramie River from

Nebraska's apportionment in *Nebraska v. Wyoming* certainly binds Nebraska as a matter of *res judicata*. Decree, ¶XII(d). In all her convoluted reasoning, Nebraska offers no explanation to overcome the plain language of the Court recognizing that "[t]he waters of the . . . Laramie were previously apportioned . . . ." *Nebraska v. Wyoming*, 325 U.S. at 592 n.1. Nor does she explain how the Court could have adjusted the Laramie River apportionment in 1957 without reference to any Nebraska equities or alleged apportionment. *Wyoming v. Colorado*, 353 U.S. 953 (1957). The significance of the 1957 Laramie River decree is that it followed the North Platte Decree and confirmed that there was no restriction on Wyoming use of the water remaining in the Laramie River after the use allowed Colorado under that decree.

III. MUNICIPAL USE OF DEER CREEK RESERVOIR IS EXEMPT FROM RESTRICTION UNDER THE DECREE

A. The Special Master's Interpretation of Paragraph X of the Decree Does Not Remove Deer Creek Reservoir From Operation of the Prior Appropriation System Under Wyoming Law

Nebraska's attack on the Special Master's conclusion that municipal uses of Deer Creek Reservoir are exempt from the decreed apportionment rests upon a mischaracterization of that conclusion. Nebraska argues that, in recognizing the exemption of municipal uses under Paragraph X of the Decree, the Special Master mistakenly reads Paragraph X as saying that "*nothing* shall affect or restrict . . ." municipal uses. Nebraska Brief at 37. Nebraska then concludes:

> This interpretation gives municipal uses an absolute superiority over irrigation uses, directly upending the law of priority of appropriation in Wyoming.

Id. at 41.

Contrary to Nebraska's assertion, the Special Master never ruled that municipal uses are exempt from the intrastate law of priority under Paragraph X. In fact, he acknowledged just the opposite when he noted that municipal water rights in Wyoming "are properly administered in priority with other Wyoming water rights . . ." and "[t]here is no decree provision that specifically calls for a contrary administration of municipal water rights." Second Interim Report at 72 n.98.[13] Curiously, it was Nebraska who urged the Special Master to interpret Paragraph X as removing municipal uses from the intrastate priority system within Wyoming, as well as from the interstate apportionment under the Decree.

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13. The law of prior appropriation is established in the Wyoming Constitution:

> Priority of appropriation for beneficial uses shall give the better right.

Wyo. Const., art. 8, § 3. With regard to municipal water rights under the law of prior appropriation, the Wyoming Constitution provides:

> Municipal corporations shall have the same right as individuals to acquire rights by prior appropriation and otherwise to the use of water for domestic and municipal purposes, and the legislature shall provide by law for the exercise upon the part of incorporated cities, towns and villages of the right of eminent domain for the purpose of acquiring from prior appropriators upon the payment of just compensation, such water as may be necessary for the well being thereof and for domestic uses.

Wyo. Const., art. 13, § 5.

Nebraska's Post-Hearing Brief on Nebraska's, Wyoming's, Colorado's and the United States' Motions for Summary Judgment at 5, 7 ("because ¶X is part of Wyoming's apportionment, ordinary and usual diversions to municipalities in Wyoming and Colorado cannot be curtailed by in-state senior users") (Docket No. 375). Nebraska made that argument in an aborted attempt to prove that Deer Creek Reservoir was not needed as a municipal project because Paragraph X gave municipalities complete superiority over other intrastate as well as interstate water rights. Nebraska later recanted that interpretation of Paragraph X. Transcript of Hearing, March 9, 1992 at 29 (Docket No. 435). Either Nebraska is being duplicitous by urging one interpretation upon the Master and later attacking him as if he accepted that interpretation when in fact he rejected it, or Nebraska simply is confused.

A vestige of Nebraska's argument that Deer Creek Reservoir is not a municipal project apparently has survived Nebraska's change of position with respect to the intrastate effect of Paragraph X. Nebraska still argues that the delivery of water by exchange to municipalities, as proposed for Deer Creek Reservoir, is not an ordinary and usual municipal use. Nebraska Brief at 51-52 and n.35. Wyoming answered that argument in her brief on exceptions at 46 n.17. However, Nebraska has added a new twist to the argument by claiming that the exchange by which Deer Creek Reservoir water would be used to replace municipal depletions would "alter priorities intrastate, contrary to the express prohibition in ¶XII(a)." Nebraska Brief at 52.

Paragraph XII(a) of the Decree simply states that the relative rights of users under state law are unaffected

by the Decree, except where the Decree expressly provides otherwise.[14] In other words, the intrastate Wyoming law of prior appropriation is left intact.

Wyoming law specifically provides for exchanges in the interest of "better conservation and utilization of the state's water" and in order to "economically convey [water] to its point of use." Wyo. Stat. § 41-3-106 (Cum. Supp. 1991). Such exchanges are not in contravention of, but in full harmony with, the priority system because they may be permitted only upon a finding that other appropriators would not be adversely affected. *Id.* Such exchanges are commonly practiced within the priority system. Second Affidavit of Gordon W. Fassett at 3, ¶7, Wyoming Second Motion for Summary Judgment (Docket No. 294). Because the Wyoming law of prior appropriation allows water stored in priority in Deer Creek Reservoir to be delivered by exchange to Casper and other municipalities, Paragraph XII(a) simply confirms that the Decree shall not affect such an operation. Contrary to Nebraska's argument that Wyoming's reading of Paragraph X conflicts with Paragraph XII(a), those two provisions of the Decree together provide that any municipal use of Deer Creek Reservoir water by exchange allowable under Wyoming law is not to be restricted under the Decree.

The fact that Wyoming's law of prior appropriation was left intact by the Decree is also one reason that Nebraska has been unable to show any injury to her

14. An example of a provision in the Decree that has an effect on intrastate water rights is the determination of the diversion limits for the Nebraska State Line Canals in Paragraph IV of the Decree. *See* Wyoming Brief on Exceptions at 35-37; *Nebraska v. Wyoming*, 325 U.S. at 627 (citing *Hinderlider v. La Plata and Cherry Creek Ditch Co.*, 304 U.S. 92, 106-08 (1938)).

apportionment from Deer Creek Reservoir, regardless of the ultimate use of the stored water. Deer Creek Reservoir will store only when in priority as to existing water rights on Deer Creek as well as the storage rights of Glendo and Guernsey Reservoirs.[15] Final Environmental Impact Statement for Regulatory Permits, Deer Creek Dam and Reservoir at 2-28 to 2-29, 4-9 (Docket No. 84a); Wyoming's Answers to United States' First Set of Interrogatories at 2-3, 6-8, Nos. 2, 10-13 (Docket No. 79); Wyoming's Response to United States Third Set of Interrogatories at 11, No. 25 (Docket No. 215); Deposition of David G. Wilde at 397-98 (Docket No. 158). Consequently, Nebraska's bare allegation that Deer Creek Reservoir will interfere with flows from Deer Creek to the North Platte River that were apportioned to Nebraska is without any factual basis.

15. Nebraska has argued that similar priority protection is needed to assure the historical supply to the Inland Lakes. However, it has been established that neither state law nor the Decree creates a priority storage right for the Inland Lakes. Wyoming Brief on Exceptions at 51-56. Any question of the effect of non-municipal uses of Deer Creek Reservoir on the supply to the Inland Lakes is only a component of the larger question of the effect on the supply for the requirements of the Nebraska canals in the Guernsey to Tri-State section, including the Interstate Canal. Nebraska has failed to produce facts to show a threat to her Guernsey to Tri-State apportionment. Wyoming Brief on Exceptions at 38-43.

Similarly, the Special Master's suggestion that the Inland Lakes or the Interstate Canal could have an "interstate priority" under the Decree conflicts with the very heart of the Decree which established the percentage apportionment *in lieu of* the interstate priority system that Nebraska sought in the original proceeding. *See* Second Interim Report at 86 n.104. As proposed by the Special Master, an Inland Lakes "interstate priority" of December 6, 1904, in addition to being senior to four of the five federal reservoirs in Paragraph III, would also be senior to the majority of municipal water rights on the North Platte that Deer Creek Reservoir is designed to supplement and would curtail those municipal water rights in the event of a call for regulation.

B. Paragraph X and Paragraph XIII of the Decree Must Be Construed With Reference to Each Other

Nebraska's attempt to use the terms of Paragraph XIII(c) of the Decree to affect a municipal use conflicts with Paragraph X. The Special Master's reading of Paragraphs X and XIII of the Decree is the only common sense construction that gives effect to both paragraphs. The Decree defining the apportionment leaves municipal uses to be governed by state law. Nothing could be simpler or more straightforward.

Nebraska again looks to the record to impeach the plain meaning of Paragraph X. Nebraska Brief at 37-41. To the extent the parties' briefs and proposed decrees in the record of the original proceedings are relevant to the meaning of Paragraph X, that record discredits Nebraska's present argument. Nebraska's contemporaneous interpretation of Paragraph X was as follows:

> Nebraska Paragraph X makes a *blanket exception from the Decree for all purposes*, of water for ordinary and usual domestic, municipal and stock watering purposes.[16]

Objections of State of Nebraska to Joint Proposal for Decree . . . at 3, Appendix to Nebraska Brief at A-63 (emphasis added). The bottom line is that the Court and the parties agreed that the equities presented in the litigation did not warrant any restriction on ordinary and usual municipal uses.

16. Nebraska's proposed Paragraph X was nearly identical to the Paragraph X that was adopted. Complainant's Proposed Form of Decree . . . at 9-10, Appendix to Nebraska Brief at A-53 to A-54.

Should Nebraska desire to modify the Decree so that it could interfere with municipal uses, Nebraska must bring an action for that purpose. The Special Master and Wyoming both acknowledge that the Court retained jurisdiction under Paragraph XIII(f) of the Decree to consider such an action. However, it is undisputed that Nebraska's petition does not seek modification or reconsideration of the municipal use exemption under the Decree. Transcript of Hearing, March 9, 1992 at 27-28 (Docket No. 435); Second Interim Report at 74 n.99. Should Nebraska bring such an action, she would face a heavy burden to convince the Court that it should exercise its retained jurisdiction to relitigate the matter of municipal use in Wyoming and Colorado. *See Arizona v. California*, 460 U.S. 605, 619-20 (1983).

The Special Master has treated Nebraska's petition as an action under Paragraph XIII(c) to consider whether new restrictions on Wyoming's use of Deer Creek are necessary to protect Nebraska's apportionment under the Decree. Paragraph X provides unequivocally that the Decree shall not affect municipal use. Unless Paragraph X is modified or deleted from the Decree, no relief that the Court might find warranted under Paragraph XIII(c) could affect municipal use. Recognizing Paragraph X as a "blanket exception" from the Decree is the only construction that gives effect to both Paragraph X and Paragraph XIII.

The Special Master recommends a trial where none is necessary because he fails to recognize that the established body of law in Wyoming's system of prior appropriation will govern the use of Deer Creek Reservoir.[17] The

17. Even Nebraska notes that there is no basis for the Special Master's fear that the application of the Wyoming law of preference for domestic and municipal use will somehow be inequitable to Nebraska users. Nebraska concludes that application of Wyoming's preference would result in "no taking or impairment of rights in Nebraska." Nebraska Brief at 50. *See* Wyo. Stat. § 41-3-102 (1977). *See also* footnote 13, *supra*.

Special Master correctly recognized that any municipal use of Deer Creek Reservoir is exempt under the Decree by reason of Paragraph X. His error was in letting Nebraska's circular logic create in his mind unresolved factual questions about how Deer Creek Reservoir might be operated or administered in the future. *See* Wyoming Brief on Exceptions at 47-49. The factual questions perceived by the Special Master are immaterial to the legal conclusion that the Decree exempts ordinary municipal uses.

CONCLUSION

For the foregoing reasons, the Court should overrule Nebraska's Exceptions to the First and Second Interim Reports of the Special Master.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming

Dennis C Cook

DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

APPENDIX

EXCERPT FROM BRIEF OF DEFENDANT, STATE OF WYOMING (January 29, 1945)

(page 75)

* * *

Ramshorn Canal

An allotment for the Ramshorn Canal of 3,000 acre feet is included in the Master's Whalen-Tri-State Dam requirement (M.R pp. 59 and 245). The Tri-State Dam headgate is one mile below the Wyoming-Nebraska State line (M.R. p. 53). The headgate of the Ramshorn is 4.4 miles below the state line, as shown by Wyoming exhibit 177. Therefore, the distance between the Tri-State and Ramshorn head-

(page 76)

gates is three miles or more. This fact is confirmed by the map facing page 57 of the Master's Report. While the Master has included the Ramshorn canal as within the Whalen-Tri-State Dam section, in comparing supply with requirement, as disclosed in Table III at page 67 of his report, he has failed to take into account the supply entering the stream below the Wyoming-Nebraska state line and above Tri-State Dam, since in the tabulation only the accretion to the state line is included. Spring Creek is a tributary entering the stream below the Wyoming-Nebraska state line and above Tri-State Dam as disclosed by Wyoming exhibit 150, and the testimony concerning same at pages 27387 to 27389 of the record. The exhibit, which is self-explanatory, is at page 77 of the Appendix.

Therefrom it appears that the average May-September run-off of Spring Creek is 2,855 acre feet, as compared with the Ramshorn requirement of 3,000. While there is undoubtedly additional invisible return to the stream between the Wyoming-Nebraska line and the headgate of the Ramshorn, the measured accretion of Spring Creek is almost the equivalent of the Ramshorn requirement. Since this canal can be supplied by accretion below the Wyoming-Nebraska state line which the Master has not included in the supply for the Whalen-Tri-State Dam section, its requirement should be eliminated.